78-620

Supreme Court, U. S.
FILED
OCT 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

RAY ATKINSON, ADMINISTRATOR
of the Estate of Alex Norris
Atkinson

Petitioner

v

E. R. BASS AND A. J. HAYES, JR.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

RAY ATKINSON, ADMINISTRATOR
of the Estate of Alex Morris
Atkinson

Petitioner

v

E. R. BASS AND A. J. HAYES, JR.

Respondents

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit, to review the opinion of that Court cited herein.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, decided July 13, 1978, and numbered 77-1221 is citation of the lower court of which the petitioner seeks a review.

JURISDICTION

The jurisdiction of this Court is invoked under the authority of 28 U.S.C. 1254(1) and the power of this Court to grant the Writ of Certiorari as defined in Rule 19 of the Rules of the Supreme Court of the United States.

The case which this petition petitions this court to review is Ray Atkinson, Administrator v Bass etal, No. 77-1221, United States Court of Appeals for the Fourth Circuit, which was decided July 13, 1978 (to be published); the case is thus brought to this Court

in apt time to comply with the requirements of 28 U.S.C. 2101 (c).

There was no request for extension of time or for rehearing.

QUESTION PRESENTED

WAS IT ERROR TO GRANT JUDGMENT SUMMARILY ONLY UPON A WRITTEN MOTION FOR SUMMARY JUDGMENT IN A SUIT FOR WRONGFUL DEATH UNDER THE CIVIL RIGHTS ACT WHEN THERE WAS NO HEARING ON THE MOTION, WHEN THERE WAS NO NOTICE TO THE OPPOSING ATTORNEY, WHO LIVED AND PRACTICED IN ANOTHER DISTRICT, THAT THE DEFENDANTS WERE GOING TO THE JUDGE EX PARTE TO SEEK THE JUDGMENT AND WHEN THE COURT DID NOT GIVE NOTICE TO THE ATTORNEY FOR THE DECEASED THAT IT WAS GOING TO DECIDE THE SUMMARY JUDGMENT MOTION?, AND IS IT NOT A CONSTITUTIONAL RIGHT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS MINIMALLY TO HAVE NOTICE THAT A HEARING IS GOING TO BE HELD?

CONSTITUTIONAL PROVISIONS INVOLVED

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES ARE INVOKED.

STATUTES AND RULES INVOLVED

42 U.S.C. 1983, 28 U.S.C. 1331 and 1343 were the original jurisdictional groundings of the suit. Appeal to this Court is by petition for Certiorari, jurisdiction for which is found in 28 U.S.C. 1254 (1) and 28 U.S.C. 2101 (c). These federal statutes are found in the prints of the United States Code as they are numbered here.

STATEMENT OF THE CASE

This case was brought originally in the United States District Court for the Eastern District of North Carolina, and the original jurisdiction under which the case was brought was 42 U.S.C. 1983 and 28 U.S.C. 1331, and 1343. The plaintiff administrator of the estate of the deceased black man sought damages under the Civil Rights Act of 1964 for the wrongful taking of the plaintiff's deceased's life, alleging that the taking of his life was a violation of his constitutional rights and privileges guaranteed by the Constitution of the United States. He alleged that the defendant Sheriff was culpable under the Civil Rights Act because he acted in a grossly negligent manner in the hiring and

training of the deputy who actually shot the deceased and that the deputy was liable directly under the Civil Rights Act.

The facts surrounding the death of the Plaintiff's deceased are, in the main, not complex, but they do conflict and are subject to dispute.

The known facts are that the Defendants and the Department they worked for had used the deceased on other occasions as an informant, usually in drug cases. On the night of the death of Alex Atkinson, the defendant detective went to the door of a hotel room in Wilson, N. C. He went with another man. He knocked on the door, and as soon as he entered the room he shot Alex Atkinson, claiming Alex Atkinson had a gun in such a position that he had to shoot him to protect his own life.

A hand gun was found in the room where Alex was shot when the room was investigated. The gun had not been fired. The deceased was shown to have been shot in the right chest, and the pictures of the scene indicate his feet were toward the door and his head was toward the bed.

After the filing of the action, the defendants filed a motion for summary judgment and asked for a hearing. From this point on, the case took a most unusual turn. Although the defendants asked for a hearing, no notice of a hearing was given, and the defendants prevailed upon Judge Frank Dupree, who had not long before been appointed to the district court bench, to grant the motion without a hearing and without informing the plaintiff that the court was

going to decide the motion without a hearing. Furthermore, the United States District Court did not inform the plaintiff's attorney that the court was going to decide the motion (which decided the case). The plaintiff's attorney learned that the court had granted summary judgment as a matter of law when he received a copy of the judgment. This ended the case, unless the appellate courts could be persuaded to intervene.

The plaintiff appealed to the United States Court of Appeals for the Fourth Circuit in Richmond. That court, with Russell, Widener and Bryan sitting, heard arguments on the case, and wrote an opinion. Two of the three judges upheld the lower court, but one judge, Judge Widener, who is generally considered very conservative, could not

agree to such a summary handling of such a case. He dissented, and wrote a long dissenting opinion on the right application of the rule.

The plaintiff now petitions this Court to grant the writ to review this case.

REASONS FOR GRANTING THE WRIT

As Judge Widener stated at page 10 in his dissent in the Circuit Court's opionion, "the defendants' ex parte communication with the court, without notice given, either contemporaneously or immediately thereafter, to the opposing party concerning the substance of the communication, was an act calling for reversal when it substantially affected the substantive or procedural rights of the plaintiff and resulted in the dismissal of his claim." Indeed it was an act calling for reversal, and it is difficult to understand why the other two judges sitting on the panel did not so hold also. Their court is noted for its liberal handling of school and constitutional issues, especially in an area where the politics and mores of

the people are basically conservative, but in this case the court seemed intent on punishing the attorney for his supposed failure to act rather than getting to the issue involved; and in so doing they violated, as Judge Widener so eloquently stated in the dissent, the rights of the plaintiff and wrote an extremely narrow precedent, which they published, for the circuit that will, unless reversed, wreak havoc upon plaintiffs who are not constantly on the alert for the moves of their opponents who may decide just to walk over to see the judge and without a hearing have him rule on summary judgment motion.

Thus this Court should grant the writ because the plaintiff's rights to due process were violated, because the ruling on a motion for summary judgment

without notice or hearing is a precedent that causes a split among the circuits, because the ruling is drastically at odds with how this Court would rule on such a procedure. And thus, and finally, it is a ruling on a question of fact that is not contemplated by Rule 56 of the Rules of Civil Procedure that will fairly eviserate the Civil Rights Act of 1964 if it is allowed to stand as a precedent.

A

THE RULING SHOWS DRASTIC SPLIT AMONG THE CIRCUITS

While the ruling in this case dramatically evidences the split among the circuits on the question of notice and hearing---these cases will be cited below---it also shows that the Fourth

Circuit did not even follow its own precedents when it decided the case sub judice, for the case of Utility Control Corporation v. Prince William Construction Co., Inc., 558 F.2d 716 (4th Cir., 1977) directly opposite of the holding in the instant case. In the Utility Control case the same court, but by different judges held that the granting of summary judgment without ten days notice and a chance to cross-examine the witnesses was error. Yet, the same court, with a retired judge, Judge Bryan, sitting ruled just the opposite in the case sub judice. Surely a commercial case cannot be more important than a civil rights case.

But this just highlights the problem among the circuits and shows why the Supreme Court must speak to this issue;

otherwise some litigants will receive due process, and others will not.

The Fifth Circuit also requires notice and hearing in these type cases. In Davis v. Howard, 561 F.2d 565 (5th Cir., 1977), that court held that the strict rules of notice and hearing must be adhered to and that a grant of summary judgment without following them was reversible. The Fifth Circuit cited Gutierrez v. El Paso Community Action Program, 462 F.2d 121 (5th Cir., 1972); Scott v. Courtesy Inns, Inc; 472 F.2d 563 (5th Cir., 1973); Harrison v. Thompson, 447 F.2d 459 (5th Cir., 1972); Kibort v. Hampton, 538 F.2d 90 (5th Cir., 1976) as precedents calling for the giving of notice and hearing.

Other circuits held that notice and hearing are required. In Mustang Fuel

Corporation v. Youngstown Sheet Tube Co., 480 F.2d 607 (10th Cir., 1973) the Tenth Circuit held that notice and hearing are required in summary judgment cases.

See Summary Judgment-Hearing-Argument, 1 ALR Fed. 295. This annotation deals with the question at issue in the case sub judice, and it finds that the better rule is that notice and hearing are required unless a local rule provides otherwise. In the instant case the local rule did not provide otherwise, but the United States District Court ignored its own rule, saying in the order granting summary judgment:

> "...The defendants orginally filed a request for a hearing on their motion, but have since represented to the court their willingness to have the matter decided without oral argument."

That is quite candid, especially in the face of their own local rule that requires a hearing if the matter was uncontested. (See Rule 4-H of the Rules of the Court of the United States District Court for Eastern North Carolina.) At the time the defendants approached Judge Dupree and asked him to rule on their motion for summary judgment, the plaintiff had not filed any countervailing affidavits: because the only other person who could have given one was a young black employee of the hotel. He could not be forced to give an affidavit, but he could have been subpoenaed at a hearing if one had been held. That is the reason the ruling is so unjust. The plaintiff had a chance to overcome the affidavits if a hearing had been held; he had a chance to use one possible

witness; he would have had a chance to show that the affiants had made inaccurate statements by cross-examination. But no hearing was held. This is why the ruling was erroneous. The question was one of credibility and where that is the case, summary judgment is not proper. Exnicious v. United States, 563 F.2d 418 (9th Cir., 1977); and Mazaleski v. Truesdell, 562 F.2d 701 (D.C. Cir., 1977).

The Fourth Circuit ruling in the case sub judice also will restrict the right of argument and, especially, the use of oral evidence at the hearing on motions for summary judgment. All these cases all hold that oral evidence can be used at the hearings on motions: Chicago Title and Trust Co. v. United States Fidelity and Guaranty Co., 511 F.2d 241

(7th Cir., 1975); McGuire v. Columbia Broadcasting System, Inc., 399 F.2d 902 (9th Cir., 1968); Burnham Chemical Co. v. Borax Consolidated, 170 F.2d 569 (9th Cir., 1948) cert. den. 336 U.S. 924, 69 S. Ct. 655, 93 L.Ed. 1086 (1949).

There is thus a clear split among the circuits not only whether notice and hearing is required but also on the question of use of oral testimony at the hearings only a Supreme Court ruling on these points will resolve this exigent problem and avoid future injustices.

B

THE RULING VIOLATES DUE PROCESS

The plaintiff raised the question of violation of the plaintiff's constitutional rights in his brief to the Fourth Circuit, although the question was not set up as a separate issue because of the

Federal Rules of Appellate Procedures general requirement that any issues raised at trial be briefed. See page 4 of Brief. Furthermore, this Court can decide issues of constitutional dimension on its own motion. 28 U. S. C. 1254(1). Rules of the Supreme Court of the United States, Rule 23(1)(c). Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S. Ct. 817 (1938). Indeed, it was not possible to raise the question of the constitutionality of the failure to give notice and hold a hearing because there was no notice or hearing. One hopes that Catch-22 is not raised. Nevertheless, this does take on the aspect of a constitutional issue and this Court should so consider it.

This Court has stated many times in many contexts that notice and hearing are

required before due process is satisfied. The same should certainly apply to a motion to determine the very case itself under the statute that will carry rather an ironic appellation if this judgment is left standing: Civil Rights Act.

In point of fact in almost all other contexts this Court has required notice and hearing before allowing the loss of liberty or property. Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 required it before property could be repossessed, although the procedures for repossession that had been in use for years were used. In Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 this Court required the same before allowing

the seizure of books. Even the suspension of a driver's license in most instances requires notice and hearing. See Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L.Ed.2d 90. Contemptuous actions which the judge does not personally observe requires notice and hearing before the judge can cite for contempt. Johnson v. Mississippi, 403 U.S. 212, 91 S. Ct. 1778, 29 L.Ed.2d 423.

The list can be made much longer than these rules allow, but the point is clear, even in non-criminal cases, notice and hearing are requirements of due process. The petitioner did not receive that here. And is it not ironic that the first ten amendments applied to the federal government and not the states, but yet it is mainly the states

which have been made to comply with this great, civilized concept through the agency of the Fourteenth Amendment while the federal courts can write an opinion such as this one? Only the grant of Certiorari and a subsequent opinion forbidding such conduct will right these kind of wrongs.

C

THE COURT RULED AS A MATTER OF LAW ON A QUESTION OF FACT IN VIOLATION OF THE REQUIREMENTS OF RULE 56 AND THIS IS SO AT ODDS WITH THE REQUIREMENTS THAT THIS COURT SHOULD RECTIFY IT.

The question in this case was the wrongful death of the plaintiff's decedent. The facts have already been

recited above. It is clear that the matter was not one for judgment as a matter of law. The affidavits that had a bearing on the case had nothing to do with a question of law; they were just self-serving documents that said, in effect, I had to shoot Alex Atkinson because my own life was threatened. It is not likely that he would have admitted that he was guilty of murder or negligence, especially when the affidavit was drawn by some of the leading attorneys in the Eastern District of North Carolina. To assume, as Judge Dupree assumed, that this is a matter of law boggles the mind.

The reports are chock full of cases from the circuits reiterating, case after case, that courts cannot try issues of fact on motions for summary judgment.

But yet the temptation to rush to judgment on the improper premise that it is all a matter of law is so great that, as happened here, many person's rights to trial on the facts are lost.

It is hardly necessary to cite any of the vast array of cases that caution the district courts not to grant summary judgment when there is an issue of fact, but some are cited to show the failure of the trial court in this instance and to show why this Court should grant the writ. See older cases Colby v. Klune, 178 F.2d 87 (2nd Cir. 1946); Sarnoff v. Cioglia, 165 F.2d 167 (2nd Cir. 1948); Warner v. First National Bank of Minneapolis, 236 F.2d 853 (7th Cir. 1956); and newer cases: Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977); FLLI Moretti Cereali v. Continental Grain Co.,

563 F.2d 563 (2nd Cir. 1977). See especially Exnicious v. U. S., 563 F.2d 565 (9th Cir. 1977) where it was stated that if an inference can be drawn from the facts on which the opposing party might (repeat "might") then summary judgment is not applicable. This latter case is especially important to the case sub judice, for there are certainly inferences, from these facts that might allow the plaintiff to recover.

What is clear from the citing of all these cases is that the trial judge went so far beyond the general law on the subject that the Supreme Court should grant Certiorari and write some definitive law on the subject. Failure to do so will result in continued restrictions of the Civil Rights Act's supposedly broad grant of rights to

minorities in the area where the act was supposed to effect the greatest benefit.

CONCLUSION

For the many reasons cited herein, both as a matter requiring the Court's attention, i.e., the proper application of the Rules of Civil Procedure to protect litigant's rights, and as a matter of simple justice and to resolve the split among the circuits, the Court should grant the writ.

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APPENDIX

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1. OPINION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT..... 29

2. ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA..... 51

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1221

Roy Atkinson, Administrator of the Estate of Alex Norris Atkinson, Appellant,

v.

E. R. Bass and A. J. Hayes, Jr., Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree,Jr., District Judge.

(Argued: February 8, 1978
Decided: July 13, 1978)

Before BRYAN, Senior Circuit Judge, RUSSELL AND WIDENER, Circuit Judges.

Herman L. Taylor for Appellant; Louis B. Meyer (Lucas, Rand, Rose, Meyer, Jones & Orcutt on brief) for Appellees.

Albert V. Bryan, Senior Circuit Judge:

The District Court, we conclude, rightfully granted summary judgment as moved by defendant police officers, Bass and Hayes, in this civil rights action of plaintiff administrator against them for damages for the fatal shooting of his intestate, Alex Atkinson, in Wilson, North Carolina. 42 USC 1983.

Deceases was shot as he aimed a loaded firearm at the officers, resisting their execution upon him of a search and arrest warrant. Defendants pleaded self-defense in vindication of their act. Affidavits served with the motion and uncontroverted in any respect, conclusively established that there was no genuine issue in the case and that the homicide was justifiable. Judgment went for the defendants

November 22, 1976. The only question on this appeal, therefore, is the regularity of the procedure leading to the judgment.

Plaintiff attacks the judgment on the assertion that he was not given a hearing on the motions for summary judgment. In this he notes that contemporaneously with the filing and service of them, defendants also served notice on plaintiff's attorney that they would "bring...(the motions) on for hearing before a Judge of the United States District Court for the Eastern District of North Carolina at a time and place to be set by the Court for its convenience". The findings and order of the Court, upholding the motions and dismissing the complaint also recite that the movants thereafter "represented to the court their willingness to have the matter

decided without oral argument". Plaintiff, although never himself having requested a hearing on the motions now assigns invalidity to the judgment, in that, for want of notice to him of the waiver and submission he was deprived of the opportunity for a hearing. We cannot agree.

To the complaint filed on August 24, 1976, defendant-appellees timely responded on September 13, by the filing and service of a motion for summary judgment, accompanied by comprehensive and precise affidavits and memoranda. Thereupon, positive action was demanded of plaintiff. FRCiv. P. 56(e) explicity admonishes that he could not then simply "rest" on his complaint—that he "must" affirmatively respond.

Notwithstanding, he di absolutely nothing then or thereafter at any time. This negative determination of plaintiff subjected him to the discipline of the Rule: "If he (plaintiff) does not so respond, summary judgment, if appropriate, shall be entered against him (plaintiff)." (Accent added.) Atlantic States Const. Co. v. Robert E. Lee & Co., Inc. 406 F2d 827, 829 (4 Cir. 1969); Berry v. Atlantic Coast Line Railroad Company, 273 F2d 572, 582 (4 Cir. 1960). accordingly, judgment for the defendants rightly followed.

On appeal, plaintiff relies chiefly on Rule 56 (c) stipulating that "prior to the hearing (he) may serve opposing affidavits". His argument is that by the omission of the hearing he lost the opportunity of presenting his

defense to the motion. But this conclusion is denied by the Rule and the facts Even if this Rule 56(c) is read as squaring with the requirement of Rule 56(e) for a response, plaintiff was still in default under both Rules.

The reason is that, as he concedes in his brief, he had no affidavits and no assurance of obtaining them. Affidavits were essential in his proof, he states, because the only use he "could make of the witnesses would be to take their affidavits – if they would give them. If they would not give an affidavit, then the only other use that could be made of such witnesses would be at a hearing." (Accent added.)

Incidentally, despite his insistence that he was prejudiced because denied a chance to present affidavits,

he has not at any stage of this litigation disclosed what the affidavits would have averred. Furthermore, no proffer has ever been made of the testimony he expected from the witnesses, if they did not agree to give affidavits but had to be subpoenaed to testify at the trial. Consequently, we are considering an unreal or speculative grievance.

If he had been willing to follow the Rules, his problem with the affidavits would have been solved by Rule 56(f):

> "(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

However, plaintiff made no effort to make his difficulty "appear" to the Court. Of course, the "affidavits" required by this Rule are not those of Rule 56(c) on which plaintiff depended to prove his case; they are only explanatory of his failure to file the evidential affidavits mentioned in 56(c). Obviously, compliance with Rule 56(f) would have removed the predicament plaintiff faced.

As already noted, plaintiff further maintains that the denial of a hearing also prevented him from establishing his rebuttal through witnesses called to testify. This argument is refuted by his disregard of the requirement of Rule 56(e), as expounded earlier, necessitating a "response" to the motion.

A hearing was available to plaintiff for the asking. The District Court's local Rule 4 (H) states:

> "(H) Hearing on Motion. Motions will be considered and decided without a hearing, unless otherwise ordered by the Court, or unless requested by counsel for either movant or respondent. Uncontested motions will not be denied without giving the movant an opportunity to be heard." (Accent added.)

A like rule of the United States District Court for Maryland was upheld as Constitutional by us in United States Fidelity & Guaranty Co. v. Lawrenson, 334 F2d 464, 466 (4 Cir. 1964) cert. den. 379 US 869 (1964).

Truth is that plaintiff's failure to obtain a hearing was because throughout he had flouted the Rules. By not so much as a hint did he ever indicate

to the District Court any interest at all in contesting the motion for summary judgment. More than two months elapsed between the service of the motion and the dismissal, without "response" or appearance of any sort from plaintiff in regard thereto. If plaintiff's position be upheld, it would mean that he could indefinitely continue to do nothing, and so without end stagnate the judicial process, although he was the claimant. Surely neither the trial court nor the opposing parties should be subjected to such dilatory procedure.

Affirmed.

WIDENER, Circuit Judge, concurring and dissenting:

While I concur in the judgment of the court as to Chief of Police

Hayes, I respectfully dissent as to the judgment in favor of officer Bass.[1]

The majority opinion is plainly correct in its statement that the burden of responding to the defendants' motions for summary judgment rests squarely on the plaintiff. Moreover, if the plaintiff was having trouble obtaining responsive affidavits as he claims,[2] he should

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1. I dissent only to the judgment in favor of officer Bass. The plaintiff's attorney on oral argument candidly told us he no longer resisted the judgment in favor of Chief of Police Hayes which also rested on an alternate ground which was plainly right. I emphasize that my dissent should not be taken to imply any opinion on the merits of the case. I

also emphasize that my dissent implies no culpability on the part of the district court. I think what happened was simply a good faith mistake.

2. The plaintiff contends that witnesses which would support his claim would not give affidavits, but would testify if subpoenaed. The plaintiff's attorney specifically states that he talked to one of these who is a bellhop who was present at the scene and whose statement indicates that his testimony would refute the police officers' affidavits. While the plaintiff's attorney tells us he contemplated requiring the bellhop to testify at the scheduled hearing, we do not need to pass upon whether or not the district court must allow that procedure, for it is certain the court can compel the bellhop's testimony. See FRCP 56(f).

We are told by the defendants' attorney that he did not talk to the bellhop.

have so informed the court. Instead, he said nothing to anyone for two months after the motion for summary judgment was filed. Frankly put, the plaintiff may not be entirely without fault; nor may the procedural pitfall he has encountered have been unavoidable.

But even if the plaintiff did not do all that we might ideally expect of him, we should pursue the insistent inquiry: whether he did that which has been demanded of him by the Federal Rules of Civil Procedure and the local rules of the district court. It is on that issue that I depart from the majority.

Under FRCP 56(c), a party opposing a motion for summary judgment has until the day before the hearing on the motion to serve opposing affidavits,

for such shall be done "prior to the day of hearing." The majority dismisses any problems which arise from compliance with that procedure by observing that the plaintiff never moved for a hearing. But I submit that, because the plaintiff was on notice of the defendants' request for a hearing on their motion, a similar motion by the plaintiff would have been superfluous to the protection of the plaintiff's rights, and he should not be faulted for not having made it. Nothing in the Federal Rules of Civil Procedure or the local rules requires him to do so.

Thus, on September 13, 1976, the defendants filed with the district court a notice addressed to the attorney for the plaintiff, stating: "PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Dismiss and

Motion For Summary Judgment on for hearing before a Judge of the United States District Court for the Eastern District of North Carolina at a time and place to be set by the Court for its convenience." Under Local Rule 4(H) (see majority opinion, p. 5) a hearing would be held upon request of either party. Thus, there was no reason for the plaintiff at that time to request a hearing, and he had until the day before the prospective hearing to file a response to the defendants' motion and affidavits.

However, as stated in the district court's order, the defendants afterward represented to the court a "willingness to have the matter decided without oral argument." It appears that this representation was made

orally in an ex parte communication with the district court, initiated, we were told by the defendants at oral argument, by either a law clerk or the clerk's office. The defendants have not controverted the plaintiff's assertion that the plaintiff was given no notice of the withdrawal of the request for a hearing. Rather, the plaintiff first learned that no hearing would be held when he received the court order granting summary judgment to the defendants. Those matters stand as facts.

The defendants' ex parte communication with the court, without notice given, either contemporaneously or immediately thereafter, to the opposing party concerning the substance of the communication, was an act

calling for reversal when it substantially affected the substantive or procedural rights of the plaintiff and resulted in the dismissal of his claim. Either the court or the defendants should have notified the plaintiff, thereby affording him an opportunity to request a hearing under local rule 4(H). This duty, I believe, would lie especially heavy on the district court if it did in fact initiate the communication with the defendants, for it commented in its order, "Plaintiff has not responded in any fashion to this motion, and the time for doing so has long passed." Until the defendants withdrew their request for a hearing, which they contend was initiated by the court, a hearing was to be held at some

time in the future, and the time for filing countering affidavits could not have passed.

In conclusion, I believe the plaintiff had until the day before the hearing requested by the defendants to file a response to the motions for summary judgment. The rules demanded no more of him. Had the defendants, or the court, given notice of the withdrawal of the request for a hearing, and the plaintiff had then failed to either request a hearing or to file his response, he might have no complaint. But here he had no opportunity to take such action. One moment he had until the day before the hearing requested by the defendants to respond; the next, the withdrawal of the defendants' request for a hearing having

been accomplished without notice, he was served with a judgment against him and told that it was too late to respond. In view of the fact the plaintiff was so severely prejudiced by the failure to give notice of the ex parte communication withdrawing the request for a hearing, I see no open course but to reverse and remand to allow the plaintiff to present whatever material he may have to controvert the affidavits in support of defendants' motion for summary judgment.[3]

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3. I note in passing that this may be a case for application of FRCP 56(f) which, under certain conditions, permits the court to refuse the application for judgment in order to obtain affidavits, or depositions, or discovery.

I do not think the case of United States Fidelity and Guaranty v. Lawrenson, 334 F2d 464 (4th Cir. 1964), should be persuasive here. In that case, acting under a not too dissimilar rule, a district court in Maryland denied a frivolous motion for a new trial without the hearing demanded by the movant. It is at once apparent that the motion here was far from frivolous; it resulted in the dismissal of the claim; the denial of the hearing in Lawrenson had no bearing on the outcome of the case, while here the denial of notice resulted in a judgment on the merits against the plaintiff; and, in all events, the denial of a hearing upon request in Lawrenson is a far cry

from the cancellation of a contemplated hearing without notice.

The suggestion with which the majority opinion concludes that "(i) f plaintiff's position be upheld, it would mean he could indefinitely continue to do nothing, and so without end stagnate the judicial process, although he was the claimant," I believe to be especially unpersuasive and inapplicable here. If, in fact, the plaintiff was guilty of delay, and such is not shown in the record, all anyone had to do to end it, either the district court or the defendants, was to give the plaintiff notice of the canceled hearing. This was not done, and I think its failure should not be excused.

ROY ATKINSON, Administrator of the estate of ALEX NORRIS ATKINSON,	)	NO. 76-0031-CIV-8
Plaintiff	)	
VS.	)	ORDER
E. R. BASS AND A. J. HAYES, JR.,	)	
Defendants	)	

Plaintiff administrator alleges that the defendants, police officers in the City of Wilson, deprived his intestate of life without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Plaintiff also seeks to invoke the pendent jurisdiction of the court to assert a wrongful death action under state law. The defendants have moved for summary judgment, and have supported their motion with affidavits

drawn according to the specifications of Rule 56. Plaintiff has not responded in any fashion to this motion, and the time for doing so has long passes. The defendants originally filed a request for a hearing on their motion, but have since represented to the court their willingness to have the matter decided without oral argument.

The undisputed affidavits filed by the defendants establish the following material facts:

1. On the night of August 8, 1975, Detectives E. R. Bass and Albert N. Murray of the Wilson Police Department went to Room 448 of the Cherry Hotel, occupied by Alex Atkinson, in order to search the premises pursuant to a valid search warrant obtained earlier that same evening.

2. Upon reaching the door, the detectives positioned themselves against the outside wall of Room 448, with their backs to the wall.

3. Lewis Pennington, a bellboy in the hotel, then knocked on the door. When there was no answer, Pennington knocked a second time.

4. The detectives heard motion in the room, and Detective Bass heard a metallic click that he believed to be the sound of a cylinder closing on a revolver. He told Detective Murray this, and both drew their weapons.

5. When the door began to open, Pennington ran. Officer Bass yelled, "Police Officers with search warrant," and pushed against the door as it started to close.

6. As the door opened, Officer Bass saw Alex Atkinson standing inside the room in the doorway. Atkinson had a pistol in his hand, which he was pointing directly at Officer Bass.

7. Officer Murray, immediately behind Officer Bass, also saw Atkinson standing immediately in front of the door to Room 448 with a pistol in his hand pointed at Detective Bass.

8. Believing that Atkinson intended to shoot him, Officer Bass fired at Atkinson; Atkinson fell to the floor, dropping the pistol from his hand.

9. Atkinson died shortly thereafter as a result of the shooting.

10. Later examination of the pistol demonstrated that it was loaded with

five 32-caliber unspent bullets at the time Atkinson pointed it at Officer Bass.

11. Defendant A. J. Hayes, Jr., is currently the Chief of Police of the City of Wilson. He did not participate directly or indirectly and had no personal involvement or personal knowledge of the events surrounding the issuance of the search warrant involved, the attempted search, or the shooting of Alex Atkinson. Hayes was out of town during the entire time this incident transpired

Based on these facts, it is clear that the motion for summary judgment should be granted. It is axiomatic that a police officer may meet deadly force, State v. Fain, 229 N.C. 644, 50 S.E.2d 904 (1948); State v. Brannon, 234 N.C. 474, 67 S.E.2d 633 (1951), and

violates no one's constitutional rights when he does so. In fact, the Second Circuit has gone so far as to immunize from 1983 liability a police officer who shot and killed a fleeing felon who presented no danger to the officer, when the action was taken in reliance on a state law allowing the use of deadly force against a felon who fails to heed a warning. Jones v. Marshall, 528 F.2d 132 (2nd Cir. 1975). Although freedom from unreasonable actions by police officers is constitutionally protected. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), there is no evidence in this record of unreasonableness on the part of Officer Bass. Nor is this a case where the only person who could challenge the affidavits of the police officers is

the decedent, for the record demonstrates that two other persons, albeit intoxicated, were in Atkinson's small hotel room at the time of the shooting. Plaintiff has made no use of this potential evidence.

Concerning Police Chief Hayes, absent any evidence of personal involvement in the events that led to the death of Alex Atkinson, he cannot be held liable for damages under 1983. This Circuit has often affirmed the rule that respondent superior provides no basis for recovery in civil rights actions. Busey v. Weatherford, 528 F.2d 483 (4th Cir. 1975).

For the foregoing reasons, it is hereby

Ordered that the defendants' motion for summary judgment is granted and the action is dismissed.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

November 22, 1976

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NORTH CAROLINA

WILSON DIVISION

No. 76-0031-CIV-8

ROY ATKINSON, Administrator of the Estate of Alex Norris Atkinson, Plaintiff, v. E. R. BASS AND A.J. HAYES, JR. Defendants	NOTICE OF APPEAL

Notice is hereby given that Roy Atkinson, Administrator of the Estate of Alex Norris Atkinson, the plaintiff abovenamed, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order entered herein by

the District Court, on the 22nd day of November, 1976, granting the Motion of the defendants for Summary Judgment.

This 22nd day of December, 1976.

Herman L. Taylor
Post Office Box 20383
Greensboro, N.C. 27420

Attorney for Plaintiff

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT I, Herman L. Taylor, have this day served Respondents by mailing to them requisite number of copies of the Petition for the Writ of Certiorari and the Appendix. Three copies of both the Petition and the Appendix were mailed postage prepaid to Respondents counsel in accordance with Rule 33(1). These copies were mailed to:

Louis B. Meyer
Post Office Drawer 2008
Wilson, North Carolina
27893

This the _____ day of October, 1978

Herman L. Taylor